IN THE

Supreme Court of the United States

OCTOBER TERM, 1955

OSCAR L. GRANT, et al.,
Petitioners,

v.

EZRA TAFT BENSON, Secretary of Agriculture of the United States, and

DANIEL J. CAREY, Commissioner of Agriculture and Markets of the State of New York, Intervenor, and

ADAMS PRODUCERS COOPERATIVE, INC., et al., Intervenors, and

METROPOLITAN COOPERATIVE MILK PRODUCERS' BARGAINING AGENCY, INC., and MUTUAL FEDERATION OF INDEPENDENT COOPERATIVES, INC., Intervenors,
Respondents.

NO. 697

PETITIONERS' REPLY TO BRIEFS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

I

The respondent Secretary's statement of the Question Presented emphasizes the Secretary's conclusion that (1) the activities referred to in the challenged provisions constitute market-wide services and (2) are worth more to each producer than the amount which is paid to the cooperatives, which incur expenses in the performance of such activities at least equal to the amount thus received from the Producer Settlement Fund. This crystallizes the

extent to which the decision below clashes with *Stark*. In *Stark*, it was held that the same activities were of but indirect or incidental benefit or service to non-members, and that therefore their market-wide nature was immaterial. Hence, any value therefrom accruing to non-members or any expense incurred therein by members was likewise deemed immaterial. Therefore, this Court held, *inter alia*, that the "uniform price" requirement of the Act was violated "because non-members are paid only the blended price while members receive, through their associations, the disputed payments in addition to the blended price" (342 U. S. 451, at 464).

That the challenged orders purport to require performance of these activities, as a condition to receiving the payments, is likewise immaterial. Here, it is significant that the Briefs in Opposition do not dispute that the activities involved have been and are the normal and customary activities of efficient cooperatives in general, engaged in servicing their own members and promoting their own interests, at member expense, in all major milk markets, whether or not under regulation.[1] The activities or services "required" by the orders are merely the routine business of efficient cooperatives fulfilling their membership contracts. Hence, the above quoted conclusion in *Stark* is equally applicable here.

The 1953 Amendment, which does spell out these requirements in Sec. 927.76(e), studiously avoids reference to non-members in five of the six.[2] There is not one word in this provision (or in the findings) which requires a co-

[1] See Petition, p. 11, text and note 8; also Petition, pp. 19-20. The Department's Official Committee of Experts even testified that cooperatives elsewhere, solely member-financed, perform such services *better* than in New York: With but one exception, "New York cooperatives are not performing services in the area of Order Activities and Education comparable in scope or effectiveness to the services performed by the leading cooperatives in other markets." Vol. V, Jt. App. 2186.

[2] Only Item (5) of Sec. 927.76(e) refers to non-members, and this is answered in Petition, p. 8.

operative (or federation) to propose an amendment desired by any non-member farmers or group[3] thereof, to lend its lawyer to protect a non-member witness during cross-examination at a hearing, or to lend its economist or lawyer to help the non-member draft a proposal or to prepare his supporting evidence or brief. Hence, five of the six requirements in the 1953 Amendment neither recite on their face nor permit the construction that they require any service or benefit to non-members, other than that which might incidentally or indirectly result from activities primarily in the interest of cooperative members. Of course, neither the 1938[4] nor 1953 provision requires the maintenance of surplus disposal plants, for members or non-members.

Inasmuch as the cooperative activities involved herein are merely the customary functions of efficient cooperatives, engaged in for members at member expense throughout the United States, the fact of such expense or cost is immaterial to this case. Indeed, in *Stark* this Court took cognizance that "Cooperative plants showed higher costs than those of proprietary handlers", 342 U. S. at 455, due in part to the handling of surplus, and nevertheless held the Boston order invalid.[5]

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[3] The term non-member includes farmers who are members of, and therefore bear expenses of, the many farm organizations throughout the New York Milkshed which are not incorporated, or which do not technically meet the Capper-Volstead Act requirements [7 U. S. C. Sec. 291] referred to in Sec. 927.76(a)(1) of Order No. 27; Appendix, p. 14.

[4] See Petition, p. 12, note 10 as to the 1938 provision; and p. 14, note 12 as to the 1953 amendment. See also *infra*, p. 7, note 10.

[5] Even if the *expense* to members for such activities is as material as the Secretary contends, he made a clearly reversible error in failing to find (upon the uncontradicted evidence of his own Department's experts) the *income* received only by members from some of these very activities. His official Committee of Experts reported (Vol. V, Jt. App. 2162) that during the 13 years of 1940-1952 "it was possible for most cooperatively owned plants to negotiate handling charges more than sufficient to cover their costs." This, of

In his statement of the Question Presented, the Secretary also directs attention to the existence of New York State Order No. 126, containing terms similar to the Federal Order No. 27 here challenged. The Cooperatives' Brief in Opposition dwells first and foremost (pp. 10-11; also p. 9) upon this issue, deemed immaterial below: that Order No. 27 (unlike Order No. 4 in Boston) was issued concurrently with and complementary to the similar New York State Order No. 126. See also New York Commissioner's Brief in Opposition, pp. 3-11. This difference between the instant case and *Stark* was pressed upon the District Court below; nevertheless, that court held it immaterial to this case (Vol. I, Jt. App. 177):

> "This court is of the opinion that the New York State Act has no effect or consequences upon the Federal Order, and that the Federal Order must stand or fall under 7 U. S. C. A. Sec. 601 et seq."

In the Court of Appeals all respondents again urged at length that the concurrent order issued by the New York State Commissioner under State law distinguished this case from *Stark;* Brief of Secretary, pp. 50-51; Brief of New York Commissioner, pp. 5-13; Brief of Cooperatives, pp. 23-29. The Court of Appeals, nevertheless, distinguished this case on much different grounds, leaving the opinion of the District Court undisturbed on this point.

The milk which is calculated in the Producers Settlement Fund under Order No. 27 originates in the six states of New York, Pennsylvania, New Jersey, Connecticut, Massachusetts and Vermont (Vol. VII, Jt. App. 3165). The dairies and milk plants supplying the said area are

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course, meant revenues to members in which non-members did not share. They also testified (Vol. V, Jt. App. 2176): "It is true as stated previously, that the higher rate of payment to operating cooperatives has encouraged cooperative ownership and operation of plants, but it is apparent that in *most* instances the benefits have gone principally to the *members* of these cooperatives." (Emphasis ours.) Therefore, official statistics showed that many qualified cooperatives paid their members *above* the uniform price; Vol. III, Jt. App. 1151.

"scattered" throughout these states; *U. S.* v. *Rock Royal Cooperative Inc.*, 307 U. S. 533, 550. Nearly half of the milk shipped into New York City crosses state lines; *Titusville Dairy Products Co.* v. *Brannan*, 176 F. (2d) 332 (C. A. 3), 337, cert. den. 338 U. S. 905; and much of the milk calculated in the Producers Settlement Fund never even enters the State of New York; *id.*; and see *Dairymen's League Cooperative Association* v. *Brannan*, 173 F. (2d) 57 (C. A. 2). The New York Commissioner respondent conceded below: "There is but one pool into which intra and interstate traffic has been inextricably intermingled"; New York Commissioner's Brief, Court of Appeals, page 13. See also Brief for Respondent Cooperatives in Opposition (p. 10). It necessarily follows that the Fund directly involves interstate commerce. This being so, this Court has already ruled that New York State Order No. 126 has no bearing. In *U. S.* v. *Rock Royal Cooperative, Inc.*, 307 U. S. 533, 540, this Court held as follows:

> "* * * The two orders are in *pari materia*, one covering milk moving in or directly burdening, obstructing or affecting interstate commerce and the other covering milk in intrastate commerce * * *." [Petition of State dismissed, at 581.]

Therefore, the courts below were correct in regarding the New York State law and the Commissioner's order thereunder of no effect or consequence in this case.[6] Of course, if this case did involve the question of whether the law of a State (New York) can make valid the action of this federal

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[6] In the Act of 1937, Sec. 10(i), Congress authorized the Secretary to issue orders "complementary" to state orders, not joint orders. Federal and state milk programs may be similar and concurrent; but their orders are not joint and the Secretary does not so contend, although the two jurisdictions are referred to as having a joint "program." The Congress itself explained Sec. 10(i) of the Act as giving no new authority to the states: "Each sovereignty operates in its own sphere but can exert its authority in conformity rather than in conflict with that of the other"; *Senate Report No. 1011*, 74th Cong., 1st Sess. p. 15. It also is clear that Sec. 10(i) gave no authority to the Secretary beyond Sec. 8c, as was held below; Vol. I, Jt. App. 177.

agency held invalid elsewhere (*Stark*), it would present an additional serious issue of public importance warranting the granting of this petition.

The Secretary's findings (Vol. I, Jt. App. 110-111), as noted in the courts below and in his Brief in Opposition, emphasize the "unique" nature of the New York milkshed primarily due to its size, with 50,000 milk producers covering 6 states, and the attendant diversity of interests and conditions; Secretary's Brief, pp. 11, 22; see also Cooperatives' Brief in Opposition, pp. 7-9.

As shown above,[7] there is nothing "unique" about the activities of cooperatives in the New York milkshed or in the market-wide effects thereof, these being common to all major milk markets; and the Secretary made no finding that this market was unique in these respects. His finding that this market is "unique" (Vol. I, Jt. App. 111) is based entirely on "size" and the factors attendant to size (*id.*, pp. 110-111). When the principal respondents herein attempt to distinguish Order No. 27 from the Secretary's 63 other orders upon the basis of findings of particularly "unique" conditions, such attempt rests on differences of size and size alone.[8] However, the decisions of the courts below do not distinguish this case from *Stark* on the basis of the unique size of the New York market. The courts below attempt to distinguish the two cases upon much different grounds.

Respondents' opposition to this petition, therefore, places great emphasis on two differences (one, State Order No. 126; the other, size) between this case and *Stark*, which the courts below either discarded or deemed immaterial.

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[7] See p. 2 above, text at note 1.

[8] We submit that the issue of statutory power herein involved does not and cannot turn upon market size; prior to 1953 the Secretary himself did not think so, having promulgated similar orders in three markets much smaller than New York, including the Dayton-Springfield, Ohio, area (population only 350,000). 7 C. F. R. Sec. 971.80 (1951).

The Secretary's Brief in Oppositi ion states (p. 17) that the petition raises no question in res spect to the rulings be low that the Secretary's findings [o of fact] are supported by substantial evidence. This is tr rue. But whether the findings give legal validity to the c hallenged order provi sions under the Act of 1937 is a mu uch different question, properly raised on petition for certi iorari.

Respondent Cooperatives twice st tate (pp. 2, 5) that in the Court of Appeals petitioners ab bandoned an attack on the Secretary's findings; but such a ssertions mistake peti tioners' position. Except on one or r two obvious errors of fact [9] not directly pertinent to this pe etition, petitioners have not made an issue as to evidentiary s support of his findings.

Insofar as concerns the critical is issue upon this petition for a writ (conflict with *Stark*), majo or points raised by peti tioners are (a) the failure of the cou urts below to apply the text of *Stark* to the specific languag e of the two challenged provisions; (b) the failure of the cou urts below to give effect to the specific language [10] of these t two provisions; and (c)

[9] For example, the Secretary stressed (Vol. I, Jt. App. 112) that the number of qualified cooperatives decreased from 84 in January 1940 to 73 in June 1952. This finding was an error, since the undisputed official statistics of the Department in the same hearing record clearly showed an increase: only 64 qualified cooperatives there were on original records certified in January 1940, Ex. 16 of Vol. XIX o (Vol. VII, Jt. App. 3147). Thus, to this Court; and 66 in June 1940 (Vol. I creased. the number increased to 73, instead of dec

[10] For example, the court below erro neously assumed that the phrase "marketing facilities, i.e., pool plants" in Sec. 927.76(e), Clause (6) of the 1953 Amendment, App pendix, p. 20, had "reference of surplus milk" (Appendix, to maintaining facilities for the disposal of language clearly covers pool p. 37). See Petition, p. 13. The order plus disposal facilities. The Secretary's findings as to the phrase "m plants of any kind, whether or not surp arketing facilities" (Vol. I, Jt. App. 117, last par.) are silent as to hen facilities for the disposal of surplus milk. On the other hand, whe the Secretary's findings elsewhere did refer to "facilities for the disposal of surplus milk," he described such facilities as "manufac turing plants" or "manufac within the same finding (Vol. turing facilities" no less than 5 times wit below not only misinterpreted I, Jt. App. 115, first par.). The court be

if any findings of fact and evidence are material in construing this Act, the failure of the lower courts to consider as material certain findings of fact of the Secretary, and certain undisputed evidence of his own Department's experts; the latter evidence was erroneously deemed immaterial by the Secretary.

Petitioners do not ask this Court to correct errors of fact finding below by appraising the significance of conflicting testimony, as was done in *Graver Tank & Mfg. Co. Inc.* v. *Linde Air Products Co.*, 336 U. S. 271, 275. It is our position, first and mainly, that the Secretary, as a matter of law, lacks authority under the clear language of the Act of 1937 to issue the challenged provisions and that, therefore, his findings of fact and conclusions are immaterial. But it is our further contention that, if the evidence and findings thereon in this case may be considered in construing this Act, (a) the Secretary relied upon immaterial findings, and (b) failed to consider or make certain other findings, upon the Department's own undisputed expert evidence, which would here compel the very construction placed upon the Act by this Court in *Stark*. This Court will set aside such agency determinations, even though concurred in by lower courts. *Secretary of Agriculture, et al.* v. *United States, et al.*, 350 U. S. 162; see also *Federal Power Commission* v. *Sierra Pacific Power Company*, Nos. 51, 52, October Term 1955, decided February 27, 1956. In any event, this Court does not extend the conventional rule of acceptance of findings of fact concurred in by two courts, to acceptance of the legal significance of such facts; *United States* v. *Appalachian Elec. Power Co.*, 311 U. S. 377, 403-404; *Lustig* v. *United States*, 338 U. S. 74, 77; *Mitchell* v. *King Packing Co.*, 350 U. S. 260.

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the language of the provision, but reached a result inconsistent with the Secretary's findings thereon. Similarly, the 1938 provision was silent as to any requirement of surplus disposal facilities; Petition, p. 12, note 10.

II

The Secretary's Brief in Opposition, p. 22, does not deny that this case presents an important question of federal law. Such denial cannot be inferred from assertions that the New York market is "unique", inasmuch as the unique characteristics of this market are not the activities for which the challenged payments are made, see above, p. 6. Unlike the Secretary, the Cooperatives' Brief denies our contentions (Petition, pp. 16-18) that the decision below is precedent for the future administration of this Act in all markets regulated or to be regulated thereunder. However, the administration of this Act lies with the Secretary, not with the cooperatives. Furthermore, two of the cooperative respondents are members of the National Milk Producers Cooperative Federation which, with the consent of all respondents, filed a motion below to appear as *amicus*, reciting:

> "That many cooperative associations which are members or submembers of the Federation are performing marketwide services of various kinds in markets regulated by Federal milk marketing orders, and others plan to perform such services in the future if the validity of payments to cooperatives for such services is sustained in this case, * * *.
>
> That the decision in this case will set a precedent which will affect the Federation and those cooperative associations represented by it which are engaged in the marketing of milk under Federal milk marketing orders, as well as those which plan to be so engaged in the future."

Although petitioners, as appellants below, opposed this motion, it was on other grounds. This motion is part of the record certified to this Court.

On February 16, 1956, the day after the Petition herein was filed in this Court, the major cooperative of the Washington, D. C. market filed[11] with the Secretary of

[11] Petition of Maryland and Virginia Milk Producers Assn., Inc., filed in Office of Hearing Clerk.

Agriculture a formal request for a hearing upon, and issuance of, a proposed milk marketing order for that market, designated Proposed Order No. 45. Sec. 945.55(g) of said Proposed Order No. 45 contains a provision for cooperative payments *identical* with the provision of Order No. 27 in effect prior to 1953. The above facts sustain petitioners' position as to the national importance of the decision below.

Respectfully submitted,

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PETITION FOR REHEARING OF ORDER DENYING PETITION FOR WRIT OF CERTIORARI

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Motion for Leave to File Petition for Rehearing

Petitioners respectfully move for leave to file the annexed Petition for Rehearing of the Order of this Court denying the Petition for Writ of Certiorari in this case, entered on April 9, 1956. Rehearing is sought at this time because, as is pointed out more fully in the annexed petition, substantial grounds available to petitioners were not previously presented, one of which is based upon *Schriber-Schroth Co.* v. *Cleveland Trust Co.*, 305 U. S. 47.

Dated: April 18, 1956.

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